SUPREME COURT OF ARKANSAS

No. 06-1284

HELENA-WEST HELENA SCHOOL DISTRICT #2 OF PHILLIPS COUNTY, ARKANSAS; RUDOLPH HOWARD, INTERIM SUPERINTENDENT IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; AND LISA BAKER IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS PRINCIPAL OF WEST SIDE ELEMENTARY SCHOOL OF THE HELENA-WEST HELENA SCHOOL DISTRICT, PETITIONERS; VS. THE CIRCUIT COURT OF PHILLIPS COUNTY, ARKANSAS, RESPONDENT;	**Opinion Delivered** JANUARY 25, 2007 PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, CERTIORARI PETITION DENIED.

DONALD L. CORBIN, Associate Justice

Petitioners are the Helena-West Helena School District, the District's Interim Superintendent, Rudolph Howard, and Lisa Baker, Principal of West Side Elementary School. They are seeking either a writ of prohibition or, alternatively, certiorari, to prevent the Respondent, the Circuit Court of Phillips County, Arkansas, from further exercising jurisdiction in the instant matter. In support of their petition, they assert that the trial court acted wholly without jurisdiction when it entered a temporary restraining order in this case, because the parties seeking that restraining order failed to first exhaust their administrative

remedies. As Petitioners are seeking a writ of prohibition or certiorari, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(3). We deny the petition.

The facts underlying this case indicate that Jimmy and Coretta Brown filed a complaint in the Phillips County Circuit Court on October 24, 2006, alleging that their two minor children, J.B., age nine, and Y.B., age eleven, both students at West Side Elementary, had been verbally abused and attacked by the school's principal, Ms. Baker, on or about October 18, 2006, in a confrontation that resulted in the children being escorted from the building and placed under arrest by the West Helena Police Department.[1] The complaint further alleged that the Browns were subsequently notified that their two children had been expelled from the Helena-West Helena School District for the remainder of the year. Plaintiffs averred that the expulsion would cause irreparable harm to their minor children and further that they would be denied due process, as they alleged that there was no school board within the Helena-West Helena School District. The Browns requested the trial court to intervene and issue a temporary restraining order enjoining the Petitioners from expelling their children.

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[1]Disciplinary records from the school that are included in the record reveal that on the morning of October 18, Ms. Baker encountered Y.B. and J.B. in the hallway and instructed them to go to the cafeteria. Once in the cafeteria, Y.B. and another student engaged in a verbal disagreement. Y.B. and J.B. then left the cafeteria and proceeded to Ms. Baker's office. According to the report filed by Ms. Baker, J.B. slapped her across the face. Y.B. tried to take a tape recorder from her hand and then placed her open palm on Ms. Baker's nose. The report concluded that the children, who were cursing and yelling, left the office, kicked the emergency bar on an exit door, and left the school building.

On October 31, 2006, the trial court entered an order granting the request for the temporary restraining order, prohibiting any further action related to their expulsion. In addition, the order required that the children be immediately transferred and placed into appropriate classes at Beechcrest Elementary School.

This court issued a stay of the trial court's October 31 order, pending review of Petitioners' request for extraordinary relief. On December 7, 2006, this court ordered the parties to this matter to submit simultaneous briefs by December 21, 2006. Petitioners are the only party to have submitted a timely brief.[2] We now consider the merits of the instant petition.

As their first point on appeal, Petitioners contend that a writ of prohibition is warranted in this matter, as the Browns failed to exhaust their administrative remedies before seeking redress in circuit court. Specifically, Petitioners contend that no final action has been taken in the matter, as only a recommendation of suspension has been made, and that the Browns failed to avail themselves of the opportunity of two separate hearings before the school board. Thus, according to the Petitioners, the trial court was without jurisdiction to hear the Browns' complaint. Petitioners further point out that the school district, pursuant to Ark. Code Ann. § 6-18-507 (Repl. 1999), has the right to expel a student, and that a trial court's right to review the ultimate decision of expulsion is on an abuse-of-discretion

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[2]Counsel for the Browns tendered a "Second Response and Objection to Issuance of Writ of Certiorari" on December 27, 2006. As the time for filing briefs had already elapsed, this second response was not timely filed and will not be considered by this court.

standard, not on a *de novo* basis, as would be the case here if the Browns were allowed to proceed.

In their initial response to this petition, the Browns argued that extraordinary relief was not warranted, as Petitioners have another adequate remedy available at law, namely an appeal of the trial court's order granting the temporary restraining order. The Browns are correct. Because an order granting a temporary restraining order is immediately appealable, Petitioners should have filed an appeal from the trial court's order, as opposed to seeking a writ of prohibition or certiorari.

It is well settled that a writ of prohibition is an extraordinary writ that is only appropriate when the lower court is wholly without jurisdiction. *Jordan v. Circuit Court of Lee County*, 366 Ark. 326, ___ S.W.3d ___ (2006); *Ouachita R.R., Inc. v. Circuit Court of Union County*, 361 Ark. 333, 206 S.W.3d 811 (2005); *Patterson v. Isom*, 338 Ark. 234, 992 S.W.2d 792 (1999). Jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties. *Ulmer v. Circuit Court of Polk County*, 366 Ark. 212, ___ S.W.3d ___ (2006); *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003). In *Conner*, we thoroughly explained our standard of review for a writ of prohibition and stated:

> The writ is appropriate only when there is no other remedy, such as an appeal, available. Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. This court confines its review to the pleadings in the case. Moreover, prohibition is never issued to prohibit a trial court from erroneously exercising its jurisdiction.

355 Ark. at 425-26, 139 S.W.3d at 478 (citations omitted). In *Ulmer*, 366 Ark. at ___, ___ S.W.3d at ___, we further explained that "writs of prohibition are prerogative writs,

extremely narrow in scope and operation; they are to be used with great caution and forbearance." Simply stated, writs of prohibition should issue only in cases of extreme necessity. *Id*.

Petitioners concede that they have sought a writ of prohibition even though our case law dictates that a writ of prohibition cannot be invoked to correct an order already entered, *see Bates v. McNeil*, 318 Ark. 764, 888 S.W.2d 642 (1994), but argue that a writ of certiorari is warranted for the reasons set forth in *Conner*, 355 Ark. 422, 139 S.W.3d 476. There, we reiterated the standards for determining the propriety of a writ of certiorari and stated as follows:

> A writ of certiorari is extraordinary relief, and we will grant it only when there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record. In determining its application, we will not look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of fact, or to reverse a trial court's discretionary authority. A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, *and there is no other adequate remedy*.

Id. at 428, 139 S.W.2d at 479-80 (emphasis added) (citations omitted). Thus, it appears from Petitioners' brief that they realize that they are not entitled to a writ of prohibition, as the trial court has already entered the order granting the temporary restraining order, but instead attempt to avail themselves of a writ of certiorari.

This court has explained that certiorari is available in the exercise of this court's superintending control over a tribunal that is proceeding illegally where no other adequate mode of review has been provided. *Beverly Enters.-Ark., Inc.. v. Circuit Court of*

Independence County, ___ Ark. ___, ___ S.W.3d ___ (June 29, 2006); *Lenser v. McGowan*, 358 Ark. 423, 191 S.W.3d 506 (2004). As previously explained, it applies where the proceedings are erroneous on the face of the record and where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion. *Arkansas Dep't of Human Servs. v. Mainard*, 358 Ark. 204, 188 S.W.3d 901 (2004). A manifest abuse of discretion is discretion exercised improvidently or thoughtlessly and without due consideration. *Jones Rigging & Heavy Hauling, Inc. v. Parker*, 347 Ark. 628, 66 S.W.3d 599 (2002).

While Petitioners' argument that the trial court was without jurisdiction to entertain the Browns' complaint because of their failure to exhaust their administrative remedies seems well taken, it is not enough to establish entitlement to extraordinary relief, either in the form of prohibition or certiorari. This court has repeatedly held that prohibition and certiorari will only lie in cases where there is no other adequate remedy available to a party. *See Conner*, 355 Ark. 422, 139 S.W.3d 476. It is axiomatic that where an appeal is available, another adequate remedy exists. *Manila Sch. Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

In the present case, the trial court issued a temporary restraining order preventing the children from being expelled from school. Such an interlocutory order is specifically appealable under Ark. R. App. P.–Civ. 2(a)(6). *See also AJ&K Operating Co., Inc. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2004) (rejecting the appellees' contention that the appellants' interlocutory appeal from the grant of a temporary restraining order was not cognizable under

our appellate rules); *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002) (holding that an interlocutory appeal from a temporary restraining order is permissible under this court's rules). Because the relief requested by Petitioners is available through an appeal of the trial court's order, they are not entitled to extraordinary relief.

A similar result was reached by this court in *Weaver v. Simes*, 365 Ark. 289, ___ S.W.3d ___ (2006). There, petitioner Johnny Weaver sought a writ of prohibition, mandamus, or certiorari after the trial court entered a temporary restraining order reinstating the former chief of police to his job. This court denied the requested relief, noting that "each of these three extraordinary writs are not available when (1) there is another adequate remedy, such as an appeal." *Id*. at 293, ___ S.W.3d at ___ (quoting *Wagner*, 357 Ark. at 26, 159 S.W.3d at 290). In so ruling, the court noted that the petitioner could raise all the issues he asserted in his emergency petition in an appeal.[3]

Accordingly, as Petitioners may raise the issues regarding the propriety of the trial court's order granting the temporary restraining order in an appeal, we deny their request for a writ of prohibition or certiorari.

Before concluding, we note that Petitioners additionally argue that the order entered by the trial court is also deficient on its face, as it fails to comply with Ark. R. Civ. P. 65.

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[3]In *Weaver*, this court noted that the petitioner, prior to seeking extraordinary relief, filed a notice of appeal on May 17, 2005, from several orders entered by the trial court, including the January 3, 2005, order granting the temporary restraining order, in support of its conclusion that petitioner had an adequate remedy at law available. In the present case, Petitioners have not yet filed their notice of appeal, as this court issued a stay of all proceedings on November 9, 2006. The lack of a notice of appeal does not negate the fact that an adequate remedy at law exists to resolve the issues raised by Petitioners.

Specifically, Petitioners contend that the trial court's order is deficient in that it makes no finding that Petitioners are likely to succeed on the merits as required by Rule 65.

Again, any issue regarding the sufficiency of the temporary restraining order or its compliance with Rule 65 is one that may be addressed in an appeal. *See Smith*, 355 Ark. 510, 140 S.W.3d 475 (holding that this court reviews the two essential components of a preliminary injunction: irreparable harm, and likelihood of success on the merits, under an abuse of discretion standard).

Petition denied.

HANNAH, C.J., and BROWN, J., dissent.

ROBERT L. BROWN, Justice, dissenting. The parents of the suspended students in this case (the Browns) bypassed the administrative remedies provided by the school district and, instead, rushed immediately into circuit court to obtain a temporary restraining order (TRO) to prevent the suspension. In issuing the TRO, the circuit judge, without question, exceeded his authority when administrative remedies provided by the school district were still available for the Browns to pursue. I would grant the school district's petition for *certiorari* and require that the school district's remedies first be exhausted before a complaint is filed in circuit court. Not to do so affirms the circuit judge's error in wading into the high risk area of school discipline before the school district had finally decided the matter.

The majority opinion says the school district should have appealed the decision rather than petition for extraordinary relief and for that reason denies the petition. This, of course, has the effect of allowing the Brown children to attend school within the school district. I

could not disagree more. This is a situation that cries out for immediate resolution so as not to further hamper discipline within the school district and the education of the Brown children. The majority's decision, which requires an appeal, denigrates the necessity for a speedy decision. The keystone of the majority opinion is that an appeal is an adequate remedy that should have been pursued by the school district. It certainly is not an adequate remedy now, because the appeal time for appealing the TRO has expired. Beginning a new appeal after a final order is entered will only delay matters more and unduly thwart the objectives of both the school district and the Browns.

This court has defined an adequate, alternative remedy to extraordinary relief as follows: "the alternative remedy must be 'plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked.'" *Axley v. Hardin*, 353 Ark. 529, 536, 110 S.W.3d 766, 770 (2003) (quoting *Hanley v. Arkansas State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198 (1998)); *see also* 55 C.J.S. *Mandamus* § 19 (2006) (other remedy to *mandamus* must be equally convenient, beneficial, and effectual). Again, appealing a final order at some point down the line is woefully inefficient and does not come close to being adequate.

The question then is whether the school district should have appealed the TRO back in November 2006, rather than petitioning for *certiorari* after the circuit judge granted a TRO. In analyzing this point, the time frame is important. The TRO was issued on October 31, 2006, and stayed by this court at the request of the school district on November 9, 2006. The school district's petition for emergency relief was filed one day earlier on November 8,

2006, and included the necessary pleadings as attachments and a prayer for expedited consideration. A response was filed by the Browns on November 21, 2006. The time for appeal of the TRO expired on November 30, 2006.

No doubt, speed was a critical consideration for the school district. There is also no question but that an appeal, even when expedited, is a more cumbersome process. A record must be filed to start the appeal process, and a motion to expedite must be filed by the appellant with time allowed for the appellee to respond. I cannot say the school district erred by putting this case on the emergency track with a petition for *certiorari*. The school district's goal was to have the matter resolved before commencement of school in January. A petition for *certiorari*, not surprisingly, appeared to be the appropriate route to take.

Cases cited by the majority in defense of dismissing this matter and delaying resolution are not apposite. In *Weaver v. Simes*, 365 Ark. 289, ____ S.W.3d ____ (2006), we dismissed the petition for emergency relief *because the petitioner had also appealed the matter*. We correctly observed that the petitioner had an alternative, adequate remedy – an appeal – and that he was pursuing it. In a later case, *Sims v. Circuit Court of Pulaski County*, ____ Ark. ____, ____ S.W.3d ____ (Nov. 30, 2006), we similarly observed that the petitioner had asked for extraordinary relief *while also appealing a related case that raised the same issue*. We correctly observed again that an adequate remedy in the form of an appeal was available to the petitioner, and that he was pursuing it. That is not the situation in the case before us.

There is another point that needs to be highlighted. This is not a case where a petitioner seeks emergency relief in the form of *certiorari* after he has allowed his appeal time to expire. We have denied such efforts in the past. *See e.g., Gran v. Hale*, 294 Ark. 563, 567, 745 S.W.2d 129, 131 (1988) ("Certiorari will not be used for the correction of mere error where the right of appeal has been lost due to the fault of the petitioner."); *Ricci v. Poole*, 253 Ark. 324, 485 S.W.2d 728 (1972). Here, the petition for *certiorari* was filed well within the appeal time. The Browns in their response did mention that the school district had an alternative remedy on November 21 but never moved to dismiss the petition on that basis. Nor did this court advise the school district that it was limited to an appeal. Instead, the appeal time expired while this court set an expedited briefing schedule on the petition for *certiorari*. *Now* this court says the school district should have appealed the TRO. It occurs to me that this court should have denied the petition for *certiorari* before the appeal time ran if that is the basis on which we are now dismissing the school district's petition.

This court has been assiduous in the past in avoiding intervention by the courts in matters best left to school authorities. We said as much two years ago. *See Johnson v. Hargrove*, 362 Ark. 649, ____ S.W.3d ____ (2005). We also have been quick to allow extraordinary relief where to wait for an appeal would cause the demise of what is sought to be protected. *See Mears v. Hall*, 263 Ark. 827, 838, 569 S.W.2d 91, 96 (1978) ("Utilizing the remedy of appeal would probably result in the demise of the public defender system while that remedy was being pursued.") Here, by the time a final order is entered and an appeal pursued, the one-year period of the suspension may well have expired.

The parties deserve a decision in this case. I would grant the school district's petition.

HANNAH, C.J., joins this dissent.